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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DALE WALKER, ET AL., Petitioners,

v.

CHARLES ROWE
and
DAVID SANDAHL, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Virginia Correctional officers, Sam Bivins, et al., respectfully moves this court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorney for the petitioners herein has been obtained, but the attorney for the respondents herein refused to consent to the filing of the requested brief amicus curiae.

The movants are nine Virginia correctional officers who are plaintiffs in an analogous action preceding in the

state courts of Virginia, Bivins, et al. v. Sielaff, et al. Movants were on duty in the Virginia State Penitentiary in April, 1985 when a riot broke out and they were repeatedly and severely attacked by rioting inmates. In their action, movants have alleged that responsible prison officals had specific betorehand knowledge of the riot, but took no action whatsoever to protect them. Movants have further alleged that the defendants inaction was a result of their desire to try to hush up the matter and to avoid any publicity on grossly insecure security conditions at the Virginia State Penitentiary.

The movants' civil action was dismissed from the pleadings by the Circuit Court for the City Richmond and is now on appeal to the Supreme Court of Virginia. One of the principal questions involved in the movants' appeal to the Virginia Supreme Court is the identical one that is presented for discussion in the instant case, that is, whether the reckless indifference of prison officials towards the security of their prison staff constitutes a violation of substantive due process. Movants seek permission to file this brief amicus curiae due to the similarities and importance of the two cases. The federal rights implicated

in both cases are identical and the egregious actions alleged by the plaintiffs herein the Virginia case deserve full adjudication.

Movants believe they can provide an argument and analysis which would be useful to the adjudication of this issue by this Court. In particular, movants believe that they can present one area of argument which will not be directly and adequately addressed by the named parties. The principle underpinning of the decision appealed from, by the Seventh Circuit, is the notion that correctional officers are free to leave their jobs and the prison wall, unlike the prisoners confined themselves. The amicus curiae brief sought to be filed by movants presents argument to the contrary which is not expected to be presented by any of the named parties herein.

In addition, the disposition by this Court in the instant case may be entirely depositive of the movants' appeal in the Virginia Supreme Court. The only manner in which movants might be effectively heard on this issue, therefore, would be through their appearance as amicus curiae before this Court in this case.

For the above reasons, movants request permission to file a brief as an amicus curiae.

Respectfully Submitted,

SAM BIVINS, ET AL.

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CERTIFICATE OF SERVICE

I, Dennis W. Dohnal, one of the attorneys for Sam Bivins, et al.,, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of August, 1986, I served copies of the foregoing Motion for Leave to File an Amicus Curiae Brief in Support of the Petition for a Writ of Certiorari thereto, as follows:

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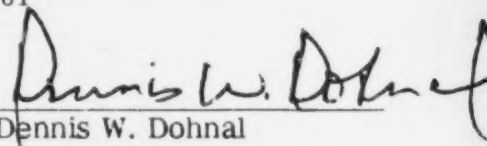

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II

QUESTION PRESENTED

IS THE RECKLESS INDIFFERENCE OF THE PRISON OFFICIALS TOWARDS THE SECURITY OF THE PRISON GUARDS A PROTECTABLE INTEREST UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND 42 U.S.C. §1983?

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INTEREST OF AMICI

The plaintiffs in the Virginia case, Sam Bivins, et al., v. Allayn Sielaff, et al., share common facts and legal issues with the plaintiffs in Walker v. Rowe. The Bivins plaintiffs are guards employed at the Virginia State Penitentiary located in Richmond, Virginia. On April 18, 1985, the Virginia Penitentiary guards were attacked by rioting prisoners under similar circumstances as the plaintiff guard in Walker

were attacked. The Virginia guards suffered aggravated personal injuries because of the gross, wanton, and unconscionable negligence of the prison officials. These facts parallel the facts in Walker v. Rowe.

From a legal perspective, the Virginia guards confront a denial of their due process rights under 42 U.S.C. §1983 and the Constitution just as the Illinois guards in Walker v. Rowe confront. The need to protect this parallel legal concern motivates the Virginia guards to file as amicus curiae.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not officially reported at this time. The unofficial citation is Walker v. Rowe, No. 85-2057 (7th Cir. May 19, 1986). The opinion of the United States District Court for the Northern District of Illinois is not officially reported at this time. The unofficial citation is Walker v. Rowe, No. 80 C 5310 (N.D. Ill. May 20, 1985). The opinion of the United States District Court for the Northern District of Illinois on the respondents' Motion to Dismiss is reported in Walker v. Rowe, 535 F. Supp. 55 (N.D. Ill. 1982).

SUMMARY OF ARGUMENT

This case presents the crucial issue of the extent to which the due process clause of the Fourteenth Amendment

protects prison employees from the gross, wanton, and reckless negligence of prison officials. It is imperative that this protection be one that will deter the excessive and unconscionable actions which caused the malicious wounding of the prison employees.

This Court has recognized the liberty right of citizens to bodily privacy and security. See, Rochin v. California, 342 U.S. 165 (1952); Estelle v. Gamble, 429 U.S. 97 (1976); Ingraham v. Wright, 430 U.S. 651 (1977); Bell v. Wolfish, 441 U.S. 520 (1979); Winston v. Lee, _____ U.S. _____, 105 S. Ct. 1611 (1985). In the given case, the plaintiffs' right to bodily privacy and security should be recognized. The gross, outrageous, wanton, and deliberate negligence of the prison officials against the guards warrant the inclusion of the guards under the umbrella protection of the due process clause's right to bodily privacy.

The distinctions drawn between employment in the prison and employment in the private sector fail to appreciate the actual working conditions in the prison. The guards' lack of freedom of entrance and exit of the prison while at work demonstrates the strict regimentation and quasi-military nature of the guards' profession.

PETITION FOR APPEAL

I. THE ACTIONS AND INACTIONS OF THE PRISON OFFICIALS WERE OF SUCH AN OUTRAGEOUS NATURE THAT THEY WARRANT PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The petitioners contend that the respondents, acting under the color of state law, violated the petitioners' right to substantive due process in that their conduct deprived the petitioners of the liberty interests guaranteed by the due process clause of the Constitution of the United States. Substantive due process offers the individual a certain zone of protected privacy into which the governments cannot intrude.

The United States Supreme Court, in accordance with the interpretation of the Fourteenth Amendment, has recognized substantive due process in several areas including: (a) the area of sexual privacy, such as abortion rights, as articulated in Roe v. Wade, 410 U.S. 113 (1973); (b) marriage as articulated in Loving v. Virginia, 388 U.S. 1 (1967); (c) family matters, as articulated in Moore v. East Cleveland, 431 U. S. 494 (1977); and (d) most importantly for

present matters, bodily security as articulated in Rochin v. California, 342 U.S. 165 (1952).

While no provision of the Bill of Rights speaks literally in terms of bodily harm or personal security, this Court has long established a threshold beyond which the due process clause's fundamental guarantee of "liberty" prohibits egregious behavior. This Court first applied substantive due process analysis to intrusions into the sanctity of the body in Rochin v. California, 342 U. S. 165 (1952). In that case, this Court determined that the use of forceable stomach pumping to extract evidence was violative of the Fourteenth Amendment in that it offended the principles of fundamental fairness. Mr. Justice Frankfurter denounced this abuse of authority as follows:

> ...we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamish or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience...this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.

342 U.S. at 172.

In Rochin, Mr. Justice Frankfurter also formed an infant definition of the individual protections under substantive due process:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked fundamental', or are 'implicit in the concept of ordered liberty.'

342 U. S. at 169 (citations ommitted).

More recent U. S. Supreme Court cases have continued to define and expand the due process protections for bodily privacy. In Ingraham v. Wright, 430 U. S. 651 (1977), the Court determined that the right to bodily privacy protected school students from the **unreasonable** infliction of corporal punishment. In viewing this right as one of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men", this Court stated that,

> Among the historic liberties so protected was the right to be free from and obtain judicial relief for unjustified intrusion on person security. While the contours of this historic liberty interest in the contexts of our

> federal system of government have not been defined precisely, they have always been thought to encompass freedom from bodily restraint and punishment.

Id., at 673-674.

In Bell v. Wolfish, 441 U.S. 520 (1970), this Court again examined the parameters of substantive due process vis a vis the liberty interests and bodily security for prisoners being held before trial. In this case federal prisoners being held for trial challenged the conditions of their confinement. Due to the fact that the Eighth Amendment applies only to convicted prisoners, this Court proceeded from a substantive due process analysis. Bell, 441 U. S. at 535, note 16. This Court determined that those penal conditions for pre-trial detainees which rose to the level of "punishment" or "unduly punitive" violated due process. Id., at 535. The proper judicial inquiry was into whether a particular bodily intrusion was "imposed for the purpose of punishment or...as an incident of some other legitimate governmental purpose." Id., at 538.

In Hall v. Tawney, 621 F. 2d 607 (4th Cir. 1980), the Fourth Circuit applied this Court's

directives concerning bodily privacy and security to school children. The Fourth Circuit stated:

> The existence of this right to ultimate bodily security--the most fundamental aspect of personal privacy--is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. Numerous cases in a variety of contexts recognize it as a last line of defense against those literally outrageous abuses of official power whose very variety make formulation of a more precise standard impossible. Clearly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail also to recognize it in public school children under the disciplinary control of public school teachers.

Hall v. Tawney, 621 F. 2d 607, 613 (4th Cir. 1980).

A consistent line of reasoning and analysis emerges from a study of these cases. The citizen enjoys a protection of bodily privacy which must be respected and protected by state authorities. Where legitimate state interests exist, government may intrude upon the individual's right; however, a line is drawn, protected by the Constitution, against intrusions rising to an unprincipled degree. When the facts

in an individual case reveal an intrusion "shocking to the conscience" as in Rochin v. California, supra, "unduly punitive" as in Bell v. Wolfish, supra, or "literally outrageous abuses" as in Hall v. Tawney, supra, then an unconstitutional violation of the right to bodily privacy and security has been laid out.

This Court's concern over unprincipled, outrageous conduct in violation of the right of bodily privacy and security reaches areas analogous to the issues of substantive due process. For example, this Court has established similar protections of bodily privacy under the Fourth and Eighth Amendments. In Estelle v. Gamble, 429 U.S. 97 (1976), this Court held that while mere negligence in medical attention does not normally rise to the level of a constitutional tort because the patient is a state prisoner, constitutional norms are violated when the denial of medical attention is so gross as to rise to the level of "deliberate indifference." This Court drew a distinction between inadvertent lapses in medical judgment, which would constitute at best state torts, and heinous acts rising to those constituting "an unnecessary and wanton infliction of pain" or "repugnant to the conscience of

mankind" which would constitute constitutional violations. Id., at 106-107.

In the Fourth Amendment contexts, a similar line has been drawn by this Court. In Winston v. Lee, _____ U.S._____, 105 S. Ct. 1611 (1985), this Court rejected as unconstitutional under the Fourth Amendment an attempt by the State to forcibly obtain a medical intrusion into a criminal suspect's body to obtain possible evidence. "A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." Id., at 1616.

Although these examples represent cases decided against the backdrop of constitutional amendments designed to protect more limited plaintiffs,[1/] these examples demonstrate analogous problems. In each case there existed a threshold over which the

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1/ The Fourth Amendment is principally designed to protect criminal suspects while the Eighth Amendment protects convicted criminals. See, Tennessee v. Garner, _____ U.S. _____, 105 S. Ct. 1694 (1985), Ingraham v. Wright, 430 U.S. 651 (1977), Bell v. Wolfish, 441 U.S. 520 (1979).

Constitution would not allow state intrusion. When the facts in a case reveal an intrusion "deliberately indifferent" to the citizens' needs as in Estelle v. Gamble, supra, or an "unreasonable magnitude" as in Winston v. Lee, supra, then an unconstitutional violation of the right to bodily privacy and security has been laid out.

In the instant case the plaintiffs are prison guards. The federal courts have held with virtual unanimity that prison officials are liable for the injuries of the victims of inmate attacks where official inaction rises to the level of gross negligence and deliberate indifference. See e.g., Withers v. Levine, 615 F. 2d 158 (4th Cir. 1980); Stokes v. Delcambre, 710 F. 2d 1120 (5th Cir. 1983); Little v. Walker, 552 F. 2d 193 (7th Cir. 1977); and Martin v. White, 742 F. 2d 469 (8th Cir. 1984). While the exact formulation of the applicable constitutional standard varies somewhat among the various federal circuits, all are consistent in holding that official inattention to the prisoner's personal security, rising to the level of "reckless", "pervasive risk of harm", "deliberate indifference" or "maliciousness" establishes a

constitutional violation. Plaintiffs' allegations here certainly meet this standard.

This Court has certainly not limited substantive due process protections for bodily security to prisoners alone. Rather, this Court has consistently imposed on state officials the duty to protect bodily security in other contexts as well as evidenced by the first part of this discussion. Given this Court's concern with extreme behavior as evidenced in the rulings in Rochin, Ingraham, Estelle, and Winston, and the ruling protecting inmates from gross negligence, the petitioners in this case deserve protection for the gross, wanton, indifferent and unconscionable negligence of the prison officials.

II. THE PRISON SYSTEM DOES NOT PROVIDE THE FREEDOM OF ENTRANCE AND EXIT THAT MOST WORKERS ENJOY, AND IN ACTUALITY PRISON GUARDS HAVE LITTLE IN SIMILARITY WITH EMPLOYEES IN THE PRIVATE SECTOR.

The principle underpinning of the Appeals Court's opinion in this case, holding that prison guards have no constitutional right to bodily protection, is the notion that prison guards voluntarily enter the

prison walls, and therefore any injuries inflicted upon them cannot be constitutionally attributed to correctional administrators. The Seventh Circuit draws an analogy between the circumstances of a prison guard and employment in the private sector. In fact, this assumption by the Seventh Circuit ignores reality. The correctional officers working in our nation's prisons are surrounded by rules and regulations not unlike those restricting movement for the prisoners which they guard.

Correctional officers are organized as a quasi-military police force. The correctional officers are subject to regulations and responsibilities unlike any codes governing private sector employees. First, prison guards have the responsibility of maintaining order among convicted criminals. The nation's prisons constitute an unusually hazardous environment. The maintenance of order and security in this environment, like that in a war zone, requires a high degree of discipline among correctional officers and a para-military structure in the chain of command.

Correctional officers working within the prison must function as a team with each officer being able to rely on his fellow guards to carry out his

related function. If a correctional officer assigned to a given shift fails to appear for his duty, that affects the safety and security of *all other officers.* The absence of one or more officers on a given shift means that some essential security function will remain unattended or that staffing and other areas of the prison are abandoned. Similarly, if a correctional officer decides to leave the prison and abandon his post during the middle of a shift, a similar breach in security will result.

The correctional officer, unlike a civilian employee, is therefore under a heavy responsibility to report before all assigned duties, and to remain at his post throughout his shift. The prison guard situation is unlike a private sector employee and is more analogous to a soldier. A soldier may enlist into the military service but, having done so, he is far from free to choose when he leaves the service or abandons any duty assignment.

Secondly, a correctional officer, like the prisoners he guards, operates within a walled and confined environment where he must seek permission to enter and leave. The gatekeeper of a prison has control over all exit and entry. Once he enters the

prison walls, a correctional officer cannot exit into the free world environment without approval. On any given shift, a correctional officer is as much confined within the prison walls as his charges. Unlike a department store employee who can leave the store during a frantic white sale, a prison guard may not sua sponte leave a prison when he fears for his safety or during a prisoner riot.

For these reasons, a prison guard is largely dependent upon his superiors and fellow correctional officers for his personal security while working within the prison environment. He is in the exact same situation as the prisoner, although for a shorter period, who must depend entirely upon his keepers for personal security. Given the correctional officers' dependence for personal security upon prison officials, they are entitled to protections similar to those enjoyed by prisoners themselves.

CONCLUSION

For the foregoing reasons amici urge this Court to reverse the opinion of the Seventh Circuit.

Respectfully submitted,

SAM BIVINS, ET AL.

By _____
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Dated: August 14, 1986

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PROOF OF SERVICE
CERTIFICATE OF SERIVCE

I, Dennis W. Dohnal, one of the attorneys for Sam Bivins, et al., Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of August, 1986, I served copies of the foregoing Amicus Curiae Brief on the parties listed as follows by mail, postage prepaid:

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All parties required to be served have been served.

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